

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

In the Matter of

BURGEMEISTER-BELL, INC.

Employer

and

Case 5-RC-15356

INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL 37,  
AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein call the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. Burgemeister-Bell, Inc., (hereinafter "the Employer"), a Maryland corporation with an office and place of business in Owings Mills, Maryland, is a construction industry employer engaged in the business of plumbing and utility contracting in the State of Maryland. During the past 12 months, a representative period, the Employer purchased and received products, goods

and materials valued in excess of \$50,000 directly from points located outside the State of Maryland. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act.

The International Union of Operating Engineers, Local 37, AFL-CIO (hereinafter “the Petitioner” or “the Union”) filed a petition seeking to represent a unit of all full time and regular part time heavy equipment operators, laborers, and pipelayers, truck drivers and mechanics employed by the Employer in its Utility Division at its Owings Mills, Maryland location, excluding all employees employed in the Employer’s Plumbing Division, plumbers, operators, and plumber’s helpers, all office clerical employees, guards, professional employees, and supervisors as defined in the Act. The Petitioner asserts that there are approximately 29 employees in the petitioned-for unit. The Employer contends that the petitioned-for unit is not appropriate. Rather, it asserts that an appropriate unit must include all full time and regular part time equipment operators, laborers, plumbers, operators, warehouse/truck drivers, equipment mechanics, dump truck, low boy drivers employed at its Utility and Plumbing Divisions at its Owings Mills, Maryland location. There are approximately 48 utility and plumbing employees in the Employer’s proposed unit.

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. There is no history of collective bargaining between the parties.

The parties stipulated that President Arthur Bell, Vice-President Francis Bauerlien, Sr., and Treasurer Jeff Loveless have the authority to hire, fire, promote and effectively recommend discipline. The parties also stipulated that Service Manager Patrick Hepburn and Supervisor Francis Bauerlien, Jr., have the authority to independently direct and assign work to employees. In addition, Francis Bauerlien, Jr., has the authority to hire and fire employees. The parties stipulated, and I find, that Arthur Bell, Francis Bauerlien, Sr., Jeff Loveless, Francis Bauerlien, Jr., and Patrick Hepburn are supervisors as defined by Section 2(11) of the Act.

At the hearing, the parties stipulated that crew leaders are working foreman and should be included in a unit found appropriate. The Petitioner in its brief withdrew certain issues and agreed to include crew leaders Diane Bauerlien and Robert Runkles, and warehousemen Brian Garvey in any unit found appropriate.

At the hearing, the parties stipulated that the following employees are excluded from any unit found appropriate because they are office clericals: Dottie Braverman, Judy Dryer, Margaret Spicer, and Paula Mock.

The Employer presented as its witness President Arthur Bell. The Petitioner presented as its witnesses employees Wendel Werner, Anthony Powell, Frankie Gilliam, William Johnson, Rufus Lee, and Darnell Felder.

## **ISSUES**

1. Whether the petitioned-for unit is an appropriate unit, or whether an appropriate unit must include all of the Employer's Plumbing Division employees.
2. Whether Orlando Norris is a supervisor within the meaning of the Act.

## **POSITIONS OF THE PARTIES**

The Petitioner contends that the petitioned-for unit is appropriate and that inclusion of Plumbing Division employees is not mandated. The Petitioner also contends that Orlando Norris is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from any unit found appropriate.

The Employer contends the unit must include all Utility Division and Plumbing Division employees. The Employer argues that the substantial evidence of interchange interaction, commonality of work rules, benefits, and supervision amongst its employees warrants a grouping of plumbers and utility employees. The Employer also maintains that Orlando Norris is not a supervisor but holds the job classification of warehouse/truck driver.

For the reasons set forth below, I find that the petitioned-for unit is an appropriate unit. In this regard, I further find the Employer's Plumbing Division to be a functionally distinct group of employees working under separate supervision, with separate hiring procedures, different work experience prerequisites (i.e., plumbing experience), and separate job qualifications (i.e., possession of an apprentice plumbers card). In addition, the core job functions of employees in the Plumbing Division are wholly different from those of employees in the Utility Division. Thus, the core functions of employees in the Plumbing Division are to use specialized plumbing skills to install interior pipes and plumbing fixtures, as well as to service indoor commercial and residential plumbing. In contrast, the core function of employees in the Utility Division is construction in nature: to use heavy construction equipment to install outdoors large sewer pipes, storm drains, and water supply pipes.

## **THE EMPLOYER'S OPERATION**

The Employer is a utility and plumbing contractor that works on pipes above and below the ground. The Employer operates from one facility that includes a fenced in yard and warehouse building. The yard is used for storage of materials and vehicles, and the warehouse houses offices, storage, and an area for mechanical work.

The Employer is organized into two divisions, Plumbing and Utility. In its Utility Division, the Employer has 33 employees including 12 operators, 14 laborers/pipelayers, 2 mechanics, 3 truck drivers, and 2 warehouse employees. In its Plumbing Division,

there are 14 employees, including 10 plumbers, and an excavating crew that consists of 4 operators or helpers. The “core group” in the Plumbing Division consists of 10 plumbers (2 master plumbers, 1-2 journeymen plumbers, and 6-7 apprentice plumbers).

Arthur Bell, III, is President of the Employer and his duties include overseeing and supervising the Utility Division. Mr. Bell is a journeyman plumber and a pre-qualified utility contractor. Francis Bauerlien, Sr., is the co-owner of the Employer; his duties include overseeing and supervising the Plumbing Division. Bauerlien, Sr., is a pre-qualified utility contractor and a master plumber.

All applicants for employment fill out an application form. Applications for utility and plumbing work are the same. Drivers fill out a separate application because of DOT requirements. Bell interviews and hires Utility Division employees, which Bauerlien, Sr. handles the interviewing and hiring of Plumbing Division employees.

Arthur Bell testified that his duties include looking for jobs, preparing quotes and prices, and supervising jobs. According to Bell, he runs daily meetings with supervisors at the Employer’s shop in Owings Mills, Maryland. Employees arrive in the morning at the Employer’s facility, pick up materials and receive assignments, and get in their trucks, and go to job sites. It is from this location that the Employer’s Plumbing Division and Utility Division crews load pipe and materials from the Employer’s warehouse onto their vehicles.

All employees start their workday at the shop and are required to punch a time card. All time cards are located in the same rack next to the time clock. The Employer also has lockers available for use by all employees. The Utility Division employees arrive at the Employer’s shop at 6:30 a.m. and end their day at around 3:30 p.m. The Plumbing Division employees arrive at 7:00 a.m. and end their day around 4:00 p.m.

## **WAGES, BENEFITS, & UNIFORMS**

All employees are paid weekly and receive the same benefits, including employer-paid holidays, vacations, and health insurance. The Employer is covered by one workmen’s compensation policy for all of its employees, although employees in the Utility Division and Plumbing Division have different codes. The Employer does not require uniforms, but some employees in both divisions have shirts and pants of similar colors available to them.

Regarding wages, most Utility Division employees earn between \$12 and \$18 per hour, and laborers in the Utility Division make between \$8 and \$12 per hour. In the Plumbing Division, plumbers, helpers, and operators earn between \$10 and \$20 per hour. The Employer’s warehouse truck drivers earn between \$10 and \$17 per hour and mechanics earn about \$20 per hour. The Employer’s lowboy truck drivers earn between \$12 and \$17 an hour.

## **SUPERVISION**

Bell and Francis Bauerlien, Jr., supervise most Utility Division employees. Francis Bauerlien, Sr., and Patrick Hepburn supervise most Plumbing Division employees. Jeff Loveless supervises the warehouse employees and truck drivers assigned to both the Utility Division and Plumbing Division, while the mechanics are supervised by Francis Bauerlien, Sr.

## **TOOLS**

Tools required by the plumbers and helpers are a tool box/bucket, striker, 10 inch adjustable wrench, hack saw, #15 tube cutters, 10 inch pipe wrench, 20 oz. claw hammer, channel locks, philips head screw driver, regular screw driver, torpedo level, measuring tape, mini-cutters, 14 inch pipe wrench, and a basin wrench.

As for Utility Division employees, Bell testified that tools used by these employees consist of a tool bucket, 10 inch adjustable wrench, #15 tube cutter, 10 inch pipe wrench, channel locks, philips screwdriver, regular screwdriver, torpedo level, measuring tape, and a 14 inch pipe wrench.

Heavy equipment operators in the Utility Division operate rubber tire loaders, truck loader machines, truck-hoes, backhoes, and bobcats. The excavation crew in the Plumbing Division operates backhoes and operates trucks.

## **SKILLS & JOB DUTIES**

Bell testified that there is virtually no difference between Utility Division and Plumbing Division employees because they all receive on the job training. However, if an applicant was looking for work in the Employer's Plumbing Division, Bell testified that the Employer would require experience in plumbing. Bell also testified that the Employer makes available apprenticeship programs including plumbing to all its employees through the Associated Builders and Contractors, a multi-employer trade association. As for license requirements, Bell testified that drivers are required to have a CDL license, and plumbers need an apprentice card from the State of Maryland, which he stated is a formality of filling out an application and paying \$15.

The Plumbing Division employees perform service work as well as initial plumbing installation work. The Employer fixes and repairs leaks and stoppages, as well as cleaning, repairing, replacing materials, and installing toilets, fixtures, and sinks. A plumbing crew typically consists of 2 men who work with indoor plumbing materials including gas, copper, black steel, and pvc pipe that is used typically in commercial and residential indoor plumbing. In performing initial installation work, the Employer utilizes Utility Division employees to complete all necessary foundation work, while Plumbing Division employees perform inside work. Bell testified that plumbing work is typically performed inside a building while utility work is performed outdoors. On occasion, Plumbing Division and Utility Division employees may be on a job together for a limited time, but for the most part, the crews work separate and apart. Regarding

Plumbing Division crews, these crews transport their equipment and materials to the job sites unless the materials are “too large”. If the materials are “too large”, the Employer’s warehouse employees load and deliver the material to the job site.

Four employees in the Plumbing Division perform operator work on a limited basis when the Employer’s Plumbing Division needs to perform outside work. On those occasions, employees operate backhoes and do excavating work by digging trenches to install pipe. The plumbing crews also perform inside work and limited outdoors work. The Employer’s plumbing excavation crew is utilized to perform trenching, grading, and digging of small ditches that are needed to complete indoor plumbing work.

In the Utility Division, the utility crews install sewer, drain, and water pipes outdoors. This work consists of moving heavy pipe and digging trenches several feet deep to lay the pipe. In order to perform these jobs, an operator digs a trench with heavy equipment and a pipelayer/laborer assembles pipe in the trenches. A typical utility crew consists of a crew leader, operators, and pipelayer/laborers.

The Employer also employs two dump truck and lowboy drivers. These drivers deliver products and/or equipment to Plumbing Division and Utility Division crews at job sites and also haul dirt away from job sites.

The Employer’s two warehousemen work in the warehouse and deliver materials to job sites. Warehousemen perform several deliveries daily to the Plumbing and Utility Division job sites; these deliveries involve the warehousemen spending about 10 to 15 minutes at a job site.

The Employer’s two mechanics perform mechanical work on trucks, small engines, generators, and saws. These employees also on occasion go on the road to fix equipment. The mechanics do all the service and maintenance work on all the equipment used in the Plumbing and Utility Divisions.

## **CONTACT/INTERCHANGE WITH OTHER EMPLOYEES**

Bell testified that the Employer’s business consists of installing pipe and that when doing residential work, Plumbing Division and Utility Division crews coordinate work so that proper connections are made from interior plumbing to sewer and water lines outside a standing structure. The Employer utilizes work order forms in its Utility and Plumbing Divisions that reflect materials used and work done at specific job sites.

The Employer at times receives large shipments of pipe (including pvc) into its warehouse that require separation and storage by warehouse employees. In order to distribute these materials to various crews, the Employer uses its transfer forms to determine what materials to allocate to each crew from storage. Once the form is processed, the materials are loaded into boxes by a warehouse employee or supervisor, and the crews then pick up their boxes and load them on their trucks. Bell testified that some pipe (pvc) stored at the Employer’s facility is used by both the Utility Division and Plumbing Division crews.

Several employees have transferred from the Plumbing Division to the Utility Division.<sup>1</sup> Specifically, Anthony Powell, who was hired in June 2001 as a plumber's helper, was transferred in November 2001 to the Utility Division.<sup>2</sup> Several years ago, Dave Matthews was transferred from the Utility Division to the Plumbing Division. Mike Sheyner transferred from the Plumbing Division to the Utility Division around July 2001. Additionally, Bell stated that the Employer temporarily transfers employees between the divisions on an as needed basis, as exemplified by utility employees Jon Dunn and Joel Greer who within the last year temporarily worked in the Employer's Plumbing Division, and Richard Green and James Redmond who were temporarily transferred from the Employer's Plumbing Division to its Utility Division within the last couple of months. Lastly, Bell stated that Orlando Brown, who is in the Employer's Plumbing Division, and worked temporarily in its Utility Division within the last six months.

### ANALYSIS

Section 9(b) of the Act states the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof...." The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act only requires that the unit be "appropriate." *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Parsons Investment Co.*, 152 NLRB 192, fn. 1 (1965); *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enf'd. 190 F.2d 576 (7<sup>th</sup> Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores, Inc.*, 160 NLRB 651 (1966). It is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-3 (4<sup>th</sup> Cir. 1962), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F. 2d 478, 480 (10<sup>th</sup> Cir. 1962).

In determining the community of interest of employees in a unit, the Board will consider skills, duties, working conditions, the Employer's organization, supervision, and bargaining history, but no one factor has controlling weight. *Airco, Inc.*, 273 NLRB 348 (1984); *E.H. Koester Bakery Co.*, 136 NLRB 1006, 1009-11 (1962); *Kalamazoo Paper Box Corp.*, 136 NLRB 136-38 (1962). The Board has long held that units in the

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<sup>1</sup> Bell testified that Robert Runkles was hired for its Plumbing Division and transferred to its Utility Division. Record evidence reveals that Mr. Runkles was originally hired in the Employer's Plumbing Division, left the Employer's employ, and later was re-hired into the Utility Division.

<sup>2</sup> According to Powell, when the Employer was going to lay off employees he talked with Service Manager Pat Hepburn and was given a transfer to the Utility Division in November 2001. Powell state that two other employees he worked with were given the same opportunity but declined.

construction industry may be appropriate on the basis of either a craft unit...or departmental unit; or so long as the requested employees are a clearly identifiable and homogeneous group with a community of interest separate and apart from other employees. *Brown & Root Braun*, 310 NLRB 632, 635 (1993); *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978); *Del Mont Construction Co.*, 150 NLRB 85 (1964).

With respect to a craft or departmental units, the general rule is: where no bargaining on a more comprehensive basis exists, a craft or traditional departmental group having a separate identity of functions, skills, and supervision, exercising craft skills or having a craft nucleus, is generally appropriate. See *E.I. Dupont & Co.*, 162 NLRB 413 (1966); see also *E.I. Dupont & Co.*, 192 NLRB 1019 (1971).

Even though the Employer's Plumbing Division and Utility Division employees have similar work hours, benefits, work rules, and wages, each Division has a separate identity. Unlike in the Utility Division, employees in the Plumbing Division perform traditional interior and limited exterior plumbing work, use different tools, are hired by a different supervisor, are required to have working knowledge of plumbing, and work with plumbing materials that are utilized and related predominately to indoor plumbing jobs. In addition, the overwhelming majority of Plumbing Division employees are separately supervised.<sup>3</sup>

Specifically, the large majority of Plumbing Division employees are hired employed because of their ability to perform plumbing related work. Their work requires that they possess a degree of skill in that area. Although a few employee job assignments and specific equipment operated (i.e., back hoes) can result in plumbing employees engaging in limited utility-related work and limited temporary interaction with Utility Division employees, their primary duties are to perform interior plumbing work independent of the Utility Division. This is evidenced by their different duties, tools used, the Employer's informal procedure that employees in the Plumbing Division obtain a state apprentice card, and by the installing of indoor fixtures and pipes as well as servicing of existing plumbing related problems that relate to fixtures and pipes that have already been installed. In contrast, the Utility Division employees perform their jobs outdoors by digging deep trenches and installing large sewer, storm drain, and water pipes. Contrary to the Employer's contention, the occasional operation of back hoes and the occasional performance of excavation work by a few plumbing employees does not establish significant functional integration between the Utility Division employees and

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<sup>3</sup> As noted above, all Plumbing Division employees except two warehouse employees/truck drivers are supervised by Bauerlien, Sr. The two warehouse employees/truck drivers are supervised in common with the three truck drivers in the Utility Division, by Jeff Loveless. Additionally, the two mechanics in the Utility Division are supervised by Bauerlien, Sr. Although overlapping supervision is a factor that would militate toward finding only a combined unit appropriate, in this case, the core group of employees in each division – the equipment operators pipelayers, and laborers in the Utility Division, and the plumbers, helpers, and excavation crew in the Plumbing Division, are separately supervised. Inasmuch as these separately supervised core groups far outweigh numerically the small number of mechanics whose supervision crosses Divisional lines, I find that the factor of separate supervision favors finding the petitioned-for unit appropriate.



the Plumbing Division employees when such use of equipment is ancillary to the majority of work performed by the Plumbing Division employees. C.f. *Machinery Movers and Erector Division Michigan Cartagemen's Association*, 117 NLRB 1778, 1780-81 (1957). Additionally, although in some limited circumstances Plumbing Division employees are temporarily assigned work in the Utility Division, such occurrences are infrequent and do not warrant the inclusion of these employees in the petitioned-for-unit. See *New Enterprise Stone & Lime Co., Inc.*, 172 NLRB 2157 (1968).

In support of its position that the Plumbing Division employees be included in the petitioned-for unit, the Employer relies on *Brown & Root*, 258 NLRB 1002 (1981), and *Longcrier Co.*, 277 NLRB 570 (1985). I find *Brown & Root* inapposite for the following reasons. First, in the instant case, unlike in *Brown & Root*, the Employer requires specific work experience (i.e., plumbing experience) and an apprentice card for all Plumbing Division employees. Second, the Employer in the instant case does not assign work based solely on its work needs but rather in almost every instance follows strict departmental lines. Lastly, I note that the facts in the instant case show that the Utility Division and Plumbing Division employees have limited contact in performing their respective duties. I also find the Employer's reliance on *Longcrier* misplaced for the following reasons. First, unlike in the instant case, *Longcrier* involved one job site of employees who were under one superintendent. Second, in *Longcrier* employees were not assigned work along departmental lines. Lastly, unlike the work in the instant case, the work assigned by the Employer in *Longcrier* was assigned to employees based on needs rather than job classification.

In *W.P. Butler Co.*, 214 NLRB 1039 (1974), citing *R.B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966), the Board held that "in the construction industry collective bargaining for groups of employees identified by function as well as those groups identified by craft skills has proven successful and has become an established accommodation to the needs of the industry and of the employees so engaged." Accordingly, the Board has found it appropriate to separate and/or exclude units of employees that engage in predominantly different functions. *W.P. Butler Co.*, at 1039. In the instant case, I find that the employees in the Employer's Utility Division are functionally distinct from the employees in the Plumbing Division and are a homogeneous group that permits the exclusion of Plumbing Division employees from the petitioned-for unit. Accordingly, I find that the petitioned-for unit of Utility Division employees is an appropriate unit. C.f. *Hydro Constructors, Inc.*, 168 NLRB 105 (1967).

## **SUPERVISOR ISSUE**

The Petitioner contends that Orlando Norris is a supervisor within the meaning of the Act. Bell testified that Orlando Norris works in the warehouse and reports to Treasurer Jeff Loveless. Bell testified that Norris is comparable to a crew leader. The evidence shows that Norris signed on the line marked for "Supervisor" one warning notice in 1995; once interviewed an applicant for employment; and once recommended a starting wage for an employee, warehousemen Brian Garvey.

Bell testified that Norris orders materials and fuel, and schedules pick ups and deliveries. He also orders plumbing and utility materials, including pvc pipe, fittings, toilets, frame-in covers, and water line fittings.<sup>4</sup> Norris distributes materials to plumbing and utility employees in the morning. He drives a delivery truck to make deliveries to jobs. Norris is hourly paid and punches a time clock. Bell testified that Norris spends 100% of his day performing warehouse related duties, including making deliveries. According to Bell, Norris cannot fire an employee but can give input to Loveless or Bell. Bell also testified that Norris recommended terminating an employee in the past, and that employee was fired. Bell testified that Norris gives input and helps interview applicants. However, he has no authority to determine a starting wage, although Norris can and does make recommendations that Bell considers in making a decision. Bell also testified that Norris has the authority to direct Garvey in the warehouse. Specifically, he can direct Garvey as to where to get things and where to take them. In this regard, Bell testified that Norris creates a schedule for Garvey to pick up and deliver supplies in the most efficient manner. Norris decides what order to do things and then gives directions to Garvey. According to Bell, Norris receives \$18 an hour. Bell stated he did not know what Garvey earns per hour.

Section 2(11) of the Act, 29 U.S.C. Section 152, provides:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. *Mississippi Power Co.*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of a Section 2(11) authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985). As pointed-out in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in *Hydro Conduit Corp.*: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is

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<sup>4</sup> There is no contention that Norris is a managerial employee.

intended to protect." See also *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). In this regard, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. *Bowne of Houston*, 280 NLRB 1222, 1224 (1986).

The party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. *Kentucky River Community Care, Inc.*, 523 U.S. \_\_\_\_ (2001). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Similarly, it is an individual's duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. *New Fern Restorium Co.*, 175 NLRB 871 (1969).

I find that the Petitioner has not met its burden of establishing that Orlando Norris is a supervisor within the meaning of Section 2(11) of the Act. The evidence does not support a finding that Norris possesses or exercise any of the primary indicia of supervisory authority set forth in Section 2(11). At most, the Petitioner has shown that Norris has, on occasion, made a recommendation and that the ultimate decision made by others was in accord with Norris' recommendation. Missing from the Petitioner's proof, however, are any facts showing a nexus between Norris' recommendation and the Employer's ultimate decision. Norris does provide direction and assignment to Garvey in the warehouse, but I find this direction and assignment to be routine and typical of that normally exercised by a leadperson. In sum, I find the degree of judgment exercised by Norris falls below the threshold required to establish statutory supervisory authority. *Dynamic Science, Inc.*, 334 NLRB No. 57 (2001); *Chevron Shipping Co.*, 317 NLRB 379 (1995).

## **ELIGIBILITY FORMULA**

The Board held in *Steiny & Co.*, 308 NLRB 1323 (1992), that the *Daniel* formula is applicable in all construction industry elections, unless the parties stipulate to the contrary. See also *Signet Testing Laboratories*, 330 NLRB 1 (1999). Here, the Employer's unit employees are engaged in the construction industry, and the parties did not stipulate that the *Daniel/Steiny* formula should not be applied. Accordingly, I find that the *Daniel/Steiny* formula, as set forth below, is the appropriate eligibility formula to be applied in this case.

The *Daniel/Steiny* formula to determine eligibility of employees in the construction industry provides that, in addition to those eligible to vote under the traditional standards, laid-off unit employees are eligible to vote in an election if they were employed by the Employer for 30 working days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment by the Employer in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Of those eligible under this formula, any employees who quit voluntarily or had been terminated for cause

prior to the completion of the last job for which they were employed are excluded and disqualified as eligible voters. *Daniel Construction Co.*, 133 NLRB 264, 267 (1961), modified 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992), overruling *S.K. Whitty & Co.*, 304 NLRB 776 (1991).

## **CONCLUSION AS TO THE UNIT**

Based on the foregoing, the record as a whole, and careful consideration of the arguments of the parties at hearing and in brief, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

All full-time and regular part-time heavy equipment operators, laborers/pipelayers, truck drivers, warehousemen, and mechanics, employed in the Employer's Utility Division at its Owings Mills, Maryland facility, excluding all Plumbing Division employees, office clerical employees, guards, professional employees, and supervisors as defined by the Act.

## **DIRECTION OF ELECTION**

An Election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 37, AFL-CIO**

## **LIST OF VOTERS**

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the

Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by, **APRIL 24, 2002**

Dated: April 10, 2002  
At Baltimore, Maryland

/s/WAYNE R. GOLD  
Regional Director, Region 5



440-1760-9100  
177-8520  
420-2900  
362-6784  
362-6798  
362-6766-2